its own use or to sell any of them as it deems fit or even to rent or lease them out.

Having considered the matter most carefully and having regard to the submissions made by all parties (including the 2nd defendant), I am inclined to accept the submission made on behalf of the plaintiff.

In my judgment, the option agreement (as amended) when construed as a whole does not constitute a brokerage or estate agency agreement. I am of the view that under the option the plaintiff has acquired proprietory rights on its own behalf and has not acted as an estate agent. The option agreement, when construed as a whole, entitles the plaintiff to purchase all 232 units for itself. There is no commission or brokerage whatsoever involved in the transaction. By reason of what I have said, I am constrained to reject the defendants' contentions and hold that there has been no contravention whatsoever of the Act by the plaintiff.

This in effect concludes the matter against, the defendants and in the plaintiff's favour. However, in deference to the industry of Counsel and the submissions they have advanced I nevertheless propose to deal with the question as to what the Act strikes at.

In my judgment, to bring the case within the relevant provisions of the Act (to which I have referred earlier) there must be some evidence, sufficient at least to raise a triable issue to warrant unconditional leave to defend, of an estate agency practice. The word "practice" which appears in the Act, in my judgment, requires some continuous activity (See *Smith v. Anderson* [1880] 15 ChD 247; *Hindustan Steel Ltd. v. The State of Orissa AIR* [1970] SC 253 and *Luxor (Eastbourne) Ltd. v. Cooper* [1941] AC 108). There is no evidential backing at all to indicate even slightly of such practice.

Conclusion

There is nothing to warrant a trial of this action. No triable issues have been raised by the defendants. Accordingly, I enter judgment in favour of the plaintiff as prayed in its summons (Encl. (14)) and equally, I hereby dismiss the 1st defendant's summons to strike out the plaintiff's action.

The plaintiff will have the costs of both applications.

UNITED ASIAN BANK BHD.

v.

DYALCHANDS SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD. YATIM J.
[SUIT NO. D4-22-440-89]
17 AUGUST 1993

GUARANTEE: Appeal against grant of summary judgment against guarantors - Whether there was demand and/or proper demand - Letters of demand purportedly sent by plaintiff's solicitors - Whether valid - Whether notice of demand properly served - Non-compliance with terms of letter of guarantee - Letter of guarantee requiring service of notice of demand by post - Notice of demand served by hand - Whether valid service - Charging of penalty interest - Whether permissible - Whether guarantors required to be notified of change in rate of interest - Guarantors signing three different guarantee agreements at different times - Whether they were continuing guarantees - Whether guarantors liable on all the agreements.

The plaintiff offered banking facilities to the first defendant upon the request of all the defendants. The second, third and fourth defendants were at all material times directors of the first defendant and had each executed three sets of letters of guarantee in favour of the plaintiff. On the first defendant defaulting in the payment of instalments, the plaintiff filed a claim against the guarantors. The plaintiff obtained summary judgment and the guarantors appealed.

The guarantors argued that the letters of guarantee made it mandatory for the notice of demand to be signed by an officer of the plaintiff, and as the letter of demand was in fact written by the solicitors for the plaintiff, there was no demand and/or proper demand by the plaintiff. The guarantors further contended that although the letters of guarantee provided for a specific mode of service, namely by post addressed to the guarantors, the plaintiff had purpotedly sent the letters of demand by hand. The guarantors submitted that they were entitled to insist on a rigid adherence to the terms of their obligation.

The guarantors also argued that the plaintiff had charged penalty interest although there was no agreement between the plaintiff and the defendants for the charging of such interest. The guarantors further alleged that the plaintiff was enforcing against the guarantors in

respect of guarantees executed for loans which had been fully settled and contended that the plaintiff could not use the guarantee executed for different accounts in 1981 and 1983 to enforce a separate loan given in 1984.

Held:

[1] It was clearly not a mandatory requirement that a bank officer must sign the letter of demand. It was only a "discretionary" requirement. The guarantee agreements provided for flexibility in the mode of making the demands and did not prohibit solicitors who were duly authorised to act on behalf of the plaintiff to issue the demands. In the circumstances, the letters of demand were properly issued by the solicitors for the plaintiff in accordance with the terms of the letters of guarantee.

[2] If the demand was sent by post it was deemed served. The clause in the guarantee relating to service was therefore a deeming provision and did not preclude personal service. To effect personal service on the defendants was not a deviation from the clause. However by effecting personal service the plaintiff cannot rely on the deeming provision and has to prove by evidence that personal service was effected.

[3] There was sufficient evidence to show that personal service of the letters of demand was properly effected on the guarantors by 6 November 1986. The subsequent denial by the third and fourth defendants that they had received the letters of demand was a mere after thought.

[4] There was no legal basis for contending that the effect of a demand notice was obviated by partial payment and that a new notice was necessary everytime payment was made. The plaintiff's cause of action against the guarantors commenced from the time of the service of the letters of demand. The cause of action remained until the trial of the action even though some monies had been paid by the guarantors to the plaintiff.

[5] Clause 11 of the letter of offer was wide enough to allow the plaintiff to charge the penalty interest. It was the discretion of the plaintiff to charge such interest and both the plaintiff and the first defendant had agreed to the terms of the letter of offer, including clause 11, when the first defendant accepted the terms of the letter of offer.

[6] The guarantors were bound to pay whatever interest was due from the borrower and as the interest payable by the borrower included the penalty interest, the guarantors, by the terms of their guarantee had to pay such interest. Under the letters of guarantee the plaintiff was not required to give notice to the guarantors on the penalty interest. Nevertheless the guarantors in fact knew of the penalty interest as they were directors of the first defendant at all material times, and the first defendant had in fact been notified by the plaintiff of the charging of penalty interest.

[7] The three sets of guarantees were continuing guarantees in respect of facilities granted to the first defendant at different times. The guarantors were therefore liable to pay the plaintiff under the three sets of guarantees.

[8] In the circumstances of the case, having considered all the issues raised by the guarantors, they have not raised any triable issues at all.

[Appeals dismissed with costs].

Cases referred to:

Malaysia Building Society Bhd. v. Chee Eng Shot & 2 Ors. [1990] 1 CLJ 97 ***(cit)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad [1989] 3 MLJ 155 ***(cit)***

Central Provident Fund Board v. Ho Bock Kee [1981] 2 MLJ 162 ***(dist)***

Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors. [1989] 1 MLJ 47 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd. [1991] 1 CLJ 667 / [1991] 1 MLJ 428 ***(foll)***

Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd. [1980] 1 MLJ 172 ***(foll)***

Development & Commercial Bank Bhd. v. Pembangunan Rumah Petani Sdn. Bhd. & 2 Ors. [1989] 3 CLJ 823 ***(refd)***

Heng Cheng Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267 ***(refd)***

Algemene Bank Nederland NV. v. Kace Advertising Sdn. Bhd. & Ors. [1989] 2 CLJ 1000 / [1989] 3 MLJ 506 ***(refd)***

Other sources referred to:

Halsburys Laws of England, 4th Edn., Vol. 1, pp. 61, 419

For the plaintiff - J. Kannaperan; M/s. Shearn Delamore & Co.

For the second defendant - Mohamad Isherafer b. Ali Mohamad; M/s. Yusuf Jargit Chow & Co.

For the first, third and fourth defendants - B. Thangaraj; M/s. Zainuriah & Thangaraj

JUDGMENT

Dr. Zakaria Bin Mohd. Yatim J:

There are two notices of appeal before me. The first notice of appeal was filed by the second defendant. The second notice of appeal was filed by the first, third and fourth defendants. In both notices of appeal, the defendants are appealing against the decision of the Senior Assistant Registrar who ordered the four defendants to pay the plaintiff the sum of RM1,580,547.15 as at 31 December 1988 together with interest as pleaded in paragraph 13 of the statement of claim and general damages.

By a letter of offer dated 19 May 1984 the plaintiff offered the first defendant banking facilities upon the request of all the defendants on the following terms:

(i) Documentary letters of credit RM800,000 with interest,
(ii) Cash credit RM150,000 with interest,
(iii) Documentary letters of credit RM600,000 with interest, and
(iv) Cash credit RM100,000 with interest.

The second, third and fourth defendants were at all material times directors of the first defendant and had each executed three sets of letters of guarantee in favour of the plaintiff for a total principal sum of RM2,315,000 together with all interests payable by the first defendant and all costs and expenses incurred. The first set of letters of guarantee were executed on 17 January 1981. The second set of letters of guarantee were executed on 14 March 1983 by the second and third defendants and on 9 June 1983 by the fourth defendant; while the third set were executed on 3 March 1984.

The plaintiff alleged that on the date the statement of claim was signed, the first defendant was indebted to the plaintiff in the sum of RM1,580,547.75.

The plaintiff's claim against the defendants is for the sum of RM1,580,547.15 as at 31 December 1988 together with interest as pleaded in paragraph 10(D) of the statement of claim; general damages and costs.

The first contention raised by the second defendant was that there was no demand and/or proper demand made by the plaintiff to the second defendant as guarantor for the payment of monies due and owing from the first defendant. The third and fourth defendants also raised a similar issue. Their arguments are almost identical as contained in their two respective written submissions.

Both Counsel for the second, third and fourth defendants (hereinafter referred to as "the guarantors") submitted that the guarantors were only liable upon written demands being made by the plaintiff. They referred to the last clause at the bottom of p. 2 of the letter of guarantee. They rightly said that the other letters of guarantee contained an identical clause. The second defendant denied receiving the letter of demand in his statement of defence. Similarly the other two guarantors, in their affidavits, denied receiving the letters of demand from the plaintiff.

According to Mr. Thangaraj, Counsel for the third and fourth defendants, the letter of demand dated 6 November 1986 was written by the solicitors for the plaintiff "purportedly" sent by hand to the second defendant. The other guarantors also said the same thing.

The guarantors contended that under the letters of guarantee, the letter of demand should be executed by an officer of the plaintiff and not by the plaintiff's solicitors. They referred to a clause in the letters of guarantee which states, "... shall be sufficient if signed by any officer of the Bank...". They argued that the word "**shall**" signified that it was mandatory for the notice of demand to be executed by an officer. They then cited *Malaysia Building Society Bhd. v. Chee Eng Shot & 2 Ors.* [1990] 1 CLJ 97 in support of their contention.

Counsel for the guarantors further contended that under the letters of guarantee the mode of service of the notice of demand was "by sending the same by post addressed to me ...". The guarantors contended that no demand was ever issued to each of them. They also denied the receipt of letters of demand sent by hand.

Counsel for the guarantors further argued that there was a specific mode of service provided in the letter of guarantee i.e. by post addressed to the guarantors. They said that instead of complying with the terms in the letter of guarantee, the plaintiff had taken a different mode of issuing the letters of demand, the receipt of which was in dispute. They submitted that the guarantors were entitled to insist on a rigid adherence to the terms of their obligation. They cited *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank*

Berhad [1989] 3 MLJ 155 in support of their proposition. They also referred to the decision of the Singapore Court of Appeal in *Central Provident Fund Board v. Ho Bock Kee* [1981] 2 MLJ 162.

They submitted that they were relying on the decision in *Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors.* [1989] 1 MLJ 47. In that case the guarantee provided that notice of demand must be effected by personal service or by posting the notice through the post. The plaintiff, instead of sending the notice by ordinary post, sent the notice of demand by AR Registered post. The Court held that by sending the notice by AR Registered post, the plaintiff had varied clause 8 of the guarantee and accordingly there was no proper and effective service of the notices of demand on the defendants.

Miss J. Kannaperan, Counsel for the plaintiff, in reply referred to the following words in the letter of guarantee: "a demand in writing ... shall be sufficient if signed by an officer of the Bank". She said that the use of the word "shall" did not mean that it was mandatory for the notice to be issued by an officer of the plaintiff. She also said that by using the word "shall" before the word "sufficient", the flexibility in the mode of making the demand remained.

She submitted that even if the demand ought only to have come from the plaintiff, a demand made by solicitors authorised to act for the plaintiff would suffice as such solicitors acted as agents of the plaintiff. She referred to **Halsburys Laws of England**, 44th Edn., Vol. 1, p. 61. She also referred to *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 MLJ 428 where the Supreme Court decided that the solicitors in that case acted as agent for the bank.

Miss Kannaperan then went on to the question of sending the letter of demand by hand instead of by post. She submitted that whilst all three sets of guarantees required the demand on the guarantors to be in writing, the plaintiff was entitled to use any mode of service of its demand in writing. If the demand was sent by post it was then deemed served. She said that the plaintiff was not precluded from effecting service of the demand in any other manner but the burden was on the plaintiff to establish receipt of such demand. She sought to distinguish *Central Provident Fund Board v. Ho Bock Kee, supra.*, on the ground that in that case clause 34(a) of the conditions of contract expressly provided that the notice was to be sent by only registered post.

Miss Kannaperan also submitted that the alleged non receipt of the demand in the present case was not *bona fide.*

It is now necessary for the Court to examine the issue on the letters of demand raised by the guarantors.

I note that the letters of demand dated 6 November 1986 were written by the solicitors for the plaintiff to the defendants separately.

The relevant clause in the letters of guarantee states as follows:

> A demand in writing shall be deemed to have been duly given to me/us of my/our legal personal representative by sending the same by post addressed to me/us at the address/ respective addresses herein written or at my/ our last known address and shall be effectual notwithstanding any change of residence or death and notwithstanding notice thereof to the Bank, and such demand shall be deemed to be received by me/us legal personal representatives twenty-four hours after the posting thereof, and shall be sufficient if signed by any officer of the Bank, and in proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and put into the post office.

The material words in the above clause are, "... and shall be sufficient if signed by any officer of the Bank....". These words do not state explicitly that the letter of demand shall be signed by a bank officer. They merely state that it **shall be sufficient** if signed by a bank officer. I agree with Miss Kannaperan that there is flexibility in the mode of making the demands. The above clause does not prohibit solicitors who were duly authorised to act on behalf of the plaintiff to issue the demands. According to **Halsbury's Laws of England**, 4th Edn., Vol. 1, p. 419, "... a solicitor may be his client's agent for the purpose of instituting or continuing legal proceedings on his behalf." In *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 MLJ 428, Jamuri Serjan SCJ, in delivering the judgment of the Supreme Court, said at p. 432:

> The only point raised on the first issue worth considering is whether there was any demand at all within the terms of cl 11 of the first guarantee as the notice of demand was signed and sent by the then solicitor for the respondent and not by one of its officers. Dato' Lim submitted that the demand was properly

made since there was evidence that the solicitor was authorized by the respondent to act on its behalf and as such the solicitor acted as agent for the bank. See **Halsbury's Laws of England** (4th Edn.) para 702 at p 419. In any event we also noted that cl 11 of the first guarantee admits of flexibility in the mode of making the demand in that it is not a mandatory but a discretionary requirement for the notice of the demand to be effectually given by a bank officer. In view of the discretionary nature of the requirement under cl 11 it is therefore proper and valid for the solicitor to act on behalf of the bank by signing and sending the notice of the demand to the appellant. Clause 11 reads as follows:

> Any notice or demand in relation to the matters aforesaid may be effectually given or made to me/us by any officer of the bank or by notice in writing under the hand of any such officer either served personally on me/us or left for or sent by post to me/us at my/our usual or last known place of business in ...

In the present case, as clearly provided by cl 11 of the first guarantee, the mode of serving the notice can either be made by an officer of the bank or by the solicitor as agent of the bank and therefore the service of the notice by the solicitor acting for the respondent is a valid notice.

In, my opinion, the flexibility in the mode of making the demand in *Lee Ah Chor's* case applies to the present case. It is clearly not a mandatory requirement that a bank officer must sign the letter of demand in the present case. It is only a "discretionary" requirement. In the circumstances, the letters of demand were properly issued by the solicitors for the plaintiff in accordance with the terms of the letter of guarantee.

The next question to consider is whether the letters of demand could be served on the guarantors by personal service.

The clause in the guarantee provides that "A demand in writing shall be deemed to have been duly given to me/us ...by sending the same by post addressed to me/us..."

Reference was made to *Rasatulin's* case by the defendants. In that case, clause 8 of the two guarantees provides that service of the notice of demand may be effected in one of two ways, that is, by personal service or by post.

In the present case, if the demand was sent by post it was deemed served. The clause in the guarantee is a deeming provision. In my view it does not preclude personal service. To effect personal service on the defendants is not a deviation from the clause. By effecting personal service, the plaintiff, however cannot rely on the deeming provision. The plaintiff has to prove by evidence that personal service was effected. Miss Kannaperan had rightly submitted that the guarantee "do not go so far as precluding service of demand by any other manner but instead place on the plaintiff the burden of establishing receipt of such demand ... as the deeming provision on service no longer applies..."

Counsel for the guarantors relied heavily on the decision in *Central Provident Fund Board's* case *supra*. In that case, Wee Chong Jim CJ, in his judgment at p. 165 said:

> In the present case the parties have expressly provided that the notice specifying the default on the part of the contractor is to be "sent by registered post". No alternative mode of service is provided for in the clause. Accordingly, we are unable to agree with Mr. Butcher that the sole purpose or object of the clause is to enable the Board to avail itself of the proof of postage and service which the use of registered postage secures. We are inclined to agree with Mr. Wright that the requirement of registered post is also for the protection of the contractor in that he is duly warned that the determination procedure has been operated and must take immediate steps to rectify the specified defaults within the time-limit prescribed in the clause. We share the view expressed by Collins J. in *Eriksson v. Whally, supra*, that the provision of this method of service no doubt was intended for the purpose of avoiding subsidiary disputes between the parties to the contract as to whether the notice was given or received as it provides for a mode of service and receipt of the required notice which can be corroborated from an independent and official source.

It is clear from the passage quoted above that the default notice was not for the sole purpose or object to enable the Board to avail itself of the proof of postage and service. The requirement of the registered post had a specific purpose that is for the protection of the contractor in that he is duly warned that the determining procedure had been operated.

In my opinion the case of *Central Provident Fund Board* does not apply to the present case. In the present case the purpose of the service of the letter of demand is to bring to the notice of the guarantors the plaintiff's letters of demand.

It is now necessary to examine from the evidence whether the personal service of the letters of demand was effected on the guarantors.

In paragraph 13 of Miss Kumari Venod's affidavit (enclosure 8), the deponent averred that the plaintiff's solicitors had by letters of demand dated 27 October 1986 and 6 November 1986 demanded the outstanding sums from the defendants.

Indeed one day after the letters of demand were served on the guarantors, the first defendant wrote a letter to the plaintiff seeking an appointment with the General Manager of the plaintiff to resolve the matter. The letter, dated 7 November 1986, is reproduced below:

> The General Manager,
> The United Asian Bank Berhad,
> Cawangan Menara,
> Menara UAB,
> Jalan Tun Perak,
> Kuala Lumpur.
>
> Attention: Mr. Kung Beng Hong
>
> Dear Sir,
>
> Credit Facilities
>
> This is to refer our letter of 20 October 1986, which was delivered to you by hand on 23 October 1986.
>
> We enclose photostat copy of letter from your solicitors, Messrs. Shearn Delamore and Company, which is self-explanatory.
>
> We will be obliged, if you could seek an appointment with you to resolve this outstanding matter.
>
> Your early attention will be highly appreciated.
>
> Thanking you.
>
> Yours faithfully,
> Dyalchands Sdn. Bhd.,
>
> Sgnd.
> Director.
>
> c.c. M/s. Shearn Delamore & Co.,
> Advocates & Solicitors.
>
> [Emphasis added]

Pursuant to the above letter the guarantors did in fact attend at the plaintiff's office and made partial payment towards the outstanding account.

In her affidavit affirmed on behalf of the plaintiff on 6 October 1990, Mrs. Indira Menon (Enclosure 34) averred in paragraph 5, that letters of demand referred to earlier were sent by hand to the defendants. The defendants did not deny receipt of these letters of demand and instead attended at the plaintiff's office upon receipt of the letters of demand on the outstanding facilities granted to the first defendant and had made partial payments towards the outstanding account.

From the above letter and from the affidavits of Miss Kumari and Mrs. Indira Menon, I am satisfied that the letters of demand had been served on the guarantors by personal service by 6 November 1986.

The guarantors did not deny receiving the said letters of demand. In his affidavit affirmed on 5 September 1989 (enclosure 11) the second defendant said that, "By reason of the above the second defendant did not comply with the letter of demand...". The fourth defendant also made the same averment in paragraph 10 of his affidavit (Enclosure 12). From the guarantors' averments in their affidavit it is implicit that they had received the letters of demand from the plaintiff's solicitors.

Based on the evidence before this Court, I am satisfied that personal service of the letters of demand was properly effected on the guarantors. I am also satisfied that from the evidence, the guarantors had received the letters of demand when the letter quoted above was written on 7 November 1986.

More than a year later the third and fourth defendants in their affidavits filed on 27 August 1990 (Enclosure 31) denied receiving any letters of demand from the plaintiff.

In my view the subsequent denial by the third and fourth defendants that they had received the letters of demand was an after thought.

The guarantors contended that fresh letters of demand should be issued to them after the partial payment was made to the plaintiff.

Miss Kannaperan submitted that there was no legal basis for contending that the effect of a demand notice was obviated by partial payment and that a new notice was necessary everytime payment was made.

I agree with Miss Kannaperan's submission. The plaintiff's cause of action against the guarantors commenced from the time of the service

of the letter of demand. The cause of action remained until the trial of the action even though some monies had been paid by the guarantors to the plaintiff. In *Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd.* [1980] 1 MLJ 172, Mohamed Azmi, J, as he then was said at p. 176, "Cause of action under the contract of guarantee clearly arises after a claim on demand is made to the defendant by the plaintiffs for the sum guaranteed".

The next issue raised by both Counsel for the guarantors was the question of penalty interest which they claimed was not agreed upon between the plaintiff and the defendants.

Both Counsel submitted that penalty interest was being imposed upon default in the payment of instalments. They said that penalty interest was different from the normal rate of interest which could be raised or increased at the discretion of the bank.

They referred to exhibit SS-1 which was annexed to Enclosure 31. The exhibit is a letter dated 17 December 1986 from the plaintiff to the first defendant. The letter reads as follows:

> Date: 17 December 1986
> 40/OT(JAB) - 6392/86
>
> M/s. Dyalchands Sdn. Bhd.,
> 63, 65 Jalan Tuanku Abdul Rahman,
> 50100, Kuala Lumpur.
>
> Dear Sir/Madam,
>
> Re: Revision of Base Lending Rate
>
> With effect from 1 December 1986, please note that the Base Lending Rate (BLR) has been revised from 10.75% p.a. to 10% p.a. The interest rate on your overdrawn current account will now be:
>
> BLR - 3.25% = 4% (Penalty) = 17.25%
>
> Yours faitfully,
>
> Sgnd.
> N.K. Nagappan,
> Manager.
>
> PV/

Counsel for the guarantors submitted that from the above letter the plaintiff was imposing 4% penalty interest above the normal interest rate of 10% (BLR) plus 3.25%.

They contended that the letter of offer merely referred to interest rates at 3.5% or 3.00% above the base lending rate. They said that there was no provision at all for the plaintiff to impose an additional interest rate upon default in payment at the rate of 4% per annum. They further said that there was no provision in the guarantee allowing the plaintiff to impose penalty interest.

Miss Kannaperan, in her reply submitted that all the three sets of guarantees signed by the second, third and fourth defendants provided that the guarantors would pay the principal sum guaranteed and interest at such rate as was due and owing from the first defendant.

She referred to clause 11 of the letter of offer and submitted that under the clause, the plaintiff reserved the rights to alter, amend and vary conditions on which the facilities were granted without the need for notice to the borrower or its guarantors'. She then cited *Development & Commercial Bank Bhd v. Pembangunan Rumah Petani Sdn. Bhd. & 2 Ors.* [1989] 3 CLJ 823.

She said that although the plaintiff was not required under the letter of offer to give notice to the borrower on the penalty interest, the plaintiff did in fact give such notice to the first defendant.

She further submitted that under the guarantee, there was no requirement for notice on change of interest to be sent individually to the guarantors'.

In considering whether or not the plaintiff was entitled to impose penalty interest it is necessary to look at the relevant documents. Paragraph 11 of the letter of offer provides:

> Notwithstanding the above, **we reserve the right to alter, amend and vary the terms and conditions** depending on the prevailing market conditions or to withdraw the facilities, if the conditions of sanction are not complied or fulfilled and/or found the operations of company to be unsatisfactory.
> [Emphasis added]

In my opinion clause 11 is wide enough to allow the plaintiff to charge the penalty interest. It is the discretion of the plaintiff to charge such interest and both the plaintiff and the first defendant had agreed to the terms of the letter of offer, including clause 11 when the first defendant accepted the terms of the letter of offer.

In *Development & Commercial Bank Bhd. v. Pembangunan Rumah Petani supra*, it was

agreed between the parties that the plaintiff "reserve the right to amend or impose additional terms and conditions which (the plaintiff) deem necessary **with written notice to you".** [Emphasis added]. In that case the plaintiff increased the rate of interest without giving notice to the borrower. The Court held that in the circumstances the plaintiff was not entitled to summary judgment against the defendants.

In the present the plaintiff was not required under the letter of offer to give notice to the first defendant when the penalty interest was charged. But due notice was, however given by the plaintiff to the borrower. In her affidavit affirmed on 6 October 1990, Mrs. Indira Menon averred in paragraphs 6 and 7 as follows:

> 6. I refer to paragraph 4 of the said affidavit and aver that any penalty interest that may have been imposed on the 1st defendant's outstanding facilities was only charged after due notice of the same had been given to the 1st defendant of which the 2nd, 3rd and 4th defendants were at all material times Directors.
>
> 7. I refer to exhibit SSI to the said affidavit and aver that any penalty imposed on the overdrawn current amount was as per normal Banking practice only in respect of the overdrawn amounts and that the defendants have never disputed such charge and have instead made payments into this account even after the charging of such interest.

According to Miss Kannaperan the first defendant and the guarantors had not denied that notices on imposition of penalty interest had been received by the first defendant. Indeed, the fourth defendant, had exhibited to his affidavit affirmed on 27 August 1990 (Enclosure 31), a copy of notice on penalty interest dated 17 December 1986 addressed to the first defendant. The text of the letter has been reproduced earlier. (See p. 19)

Miss Kannaperan submitted that there was no requirement in the letters of guarantee for notice on change of interest to be sent individually to the guarantors. She said that the guarantors were bound to pay whatever interest was due from the borrower and as the interest payable by the borrower includes the penalty interest, the guarantors, by the terms of their guarantee had to pay such interest.

Under the letter of guarantee, the guarantors -

> ... jointly and severally guarantee, on demand in writing being made to me/us, the due payment of all advances, liabilities, bills and promissory notes, whether made, incurred, or discounted before or after the date hereof, to or for the principal, either alone or jointly with any other person or persons, and also of all bills, promissory notes, or guarantees held by the Bank bearing the principal's signature/common seal, together with interest, commission, and other Banking charges including legal charges and expenses...

From the clause quoted above, I respectfully agree with Miss Kannaperan's submission. Under the letter of guarantee, the plaintiff was not required to give notice to the guarantors on the penalty interest. Although the plaintiff was not required to give them such notice, they in fact knew of it as they were directors of the first defendant at all material times. See paragraph 6 of Mrs. Indira Menon's affidavit quoted above. Furthermore, as stated earlier, the fourth defendant had exhibited a copy of the notice to his affidavit (Enclosure 31).

The next issue raised by the guarantors was that they were not liable for guarantees executed in 1981 and 1983.

Counsel for the guarantors submitted that the plaintiff was enforcing guarantees executed by the guarantors on 17 January 1981, 14 March 1983 and 9 June 1983 for different loans and not for the loan as stated in the letter of offer dated 19 May 1984. According to Counsel, the plaintiff's present claim was in respect of the loan pursuant to the letter of offer dated 19 May 1984. The guarantee dated 19 May 1984 with a limit of RM515,000 was the only guarantee relevant to the present loan. They alleged that the amount outstanding far exceeded the limit of RM515,000 and the plaintiff was enforcing against the guarantors in respect of guarantees executed for loans which had been fully settled. According to them the plaintiff could not use the guarantees executed for different accounts in 1981 and 1983 to enforce a separate loan given in 1984.

Miss Kannaperan in reply submitted that each of the three sets of guarantees executed by the three guarantors were continuing guarantees for all and every manner of facilities granted by the plaintiff to the first defendant. She said that the 1981 and 1983 guarantees were not for one particular account but covered all facilities existing as at the date of the guarantees as well as facilities to be granted in the future.

In her affidavit affirmed on 27 May 1989 on behalf of the plaintiff, Miss Kumari Venod

averred that the sum of RM1,580,547.15 claimed by the plaintiff against the defendants was the sum due pursuant to banking facilities extended by the plaintiff to the first defendant at the request of all the defendants. She said that the second, third and fourth defendants had earlier given personal guarantees for RM1,800,000 each to the plaintiff in respect of previous banking facilities given by the plaintiff to the first defendant. The second, third and fourth defendants each executed a further personal guarantee of RM515,000 as it was a term of the letter of offer dated 19 May 1984 that these defendants being directors of the first defendant each provide a personal guarantee of RM2,315,000.

The 1981 guarantee provides:

> In consideration of the Bank opening & **continuing an account** with Dyalchand Sdn. Bhd. ... or **continuing the existing account with the principal**... I ... Surjit Raj s/o Dyalchand ... jointly and severally guarantee, on demand ... the due payment of all advances, liabilities...."
> [Emphasis added].

The 1983 guarantee also contains identical words as above. The 1984 guarantee is also similar to the above. It reads:

> In consideration of United Asian Bank Berhad ... opening and continuing an account or continuing the existing account or making or continuing advances or otherwise giving credit or affording banking facilities ... I ... Surjit Raj... jointly and severally guarantee ... the due payment of advances, liabilities...

Looking at all the three sets of guarantees, I am satisfied that they are continuing guarantees in respect of facilities granted to the first defendant at different times. The guarantors are therefore liable to pay the plaintiff under the three sets of guarantees. See *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267; and *Algemene Bank Nederland NV. v. Kace Advertising Sdn. Bhd. & Ors.* [1989] 3 MLJ 506.

The last issue raised by the second defendant was the claim for general damages by the plaintiff. Miss Kannaperan informed the Court that on 19 October 1989, the Senior Assistant Registrar only granted judgment for the sum claimed with interest. I have seen the sealed order (enclosure 18) and the judgment (enclosure 19) and they confirm what Miss Kannaperan told the Court. The question of general damages is therefore not an issue in this appeal.

Having considered all the issues raised by the guarantors, I find that they have not raised any triable issue at all.

I should mention here, that the first defendant did not submit any argument in support of the appeal.

From the reasons stated above, I dismiss both the appeals with costs.